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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before the Honorable Jacqueline C. Corley, Magistrate Judge

| | | |
|------------------------------|---|--------------------------------|
| WAYMO LLC, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| VS. |) | No. C 17-0939 WHA (JSC) |
| |) | |
| UBER TECHNOLOGIES, INC.; |) | |
| OTTOMOTTO LLC; OTTO TRUCKING |) | |
| LLC, |) | |
| |) | |
| Defendants. |) | |
| _____ |) | |

San Francisco, California
Wednesday, September 27, 2017

TRANSCRIPT OF PROCEEDINGS

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1 Wednesday, September 27, 2017

2:33 p.m.

2 **P-R-O-C-E-E-D-I-N-G-S**

3 **---000---**

4 **THE CLERK:** Hello?

5 **MS. BLUNSCHI:** Hello. Melanie Blunschi and Whitney
6 Weber of Latham on behalf of Stroz Friedberg.

7 **THE CLERK:** Okay. Calling Civil Action, C 17-0939,
8 Waymo versus Uber.

9 **THE COURT:** Plaintiff?

10 **MR. PERLSON:** Good afternoon, Your Honor. David
11 Perlson, Quinn Emmanuel, here with James Judah and Linda
12 Brewer.

13 **THE COURT:** Mr. Judah, are you married?

14 **MR. JUDAH:** As an officer of the court, I have to be
15 candid, I am enjoying marital bliss.

16 **THE COURT:** Excellent. Excellent. He should get a
17 copy of that and give it to his wife.

18 **MR. GONZALEZ:** Good afternoon, Your Honor. Arturo
19 Gonzalez, Esther Kim Chang from Morrison & Foerster for Uber.

20 **THE COURT:** Good afternoon.

21 **MR. BULAND:** Cory Buland from Susman Godfrey for Uber,
22 Your Honor.

23 **THE COURT:** Good afternoon and welcome.

24 **MR. BULAND:** Thank you.

25 **MS. WALSH:** Rachel Walsh from Goodman Procter on

1 behalf of Otto Trucking.

2 **THE COURT:** Good afternoon.

3 **MR. PATCHEN:** Good afternoon, Your Honor. Jonathan
4 Patchen, Taylor & Patchen, on behalf of Lior Ron.

5 **THE COURT:** Good afternoon.

6 **MR. BROWNSTEIN:** Good afternoon, Your Honor. David
7 Brownstein on behalf of Colin Sebern.

8 **THE COURT:** Good afternoon.

9 **MR. COOPER:** John Cooper, Special Master.

10 **THE COURT:** Hello, Mr. Cooper.

11 **MR. EHRLICH:** Miles Ehrlich on behalf of
12 Mr. Levandowski.

13 **THE COURT:** Good afternoon.

14 **MR. EHRLICH:** Good afternoon.

15 **THE COURT:** All right. And I hear I have counsel for
16 Stroz on the phone, so good afternoon.

17 I know you've all had a very long morning, so we'll try to
18 cut through it and get through it quickly.

19 I want to talk to the parties about the native files and
20 the devices and getting that going. So let's start with that.

21 As I understand it, you made a proposal, and I couldn't
22 quite -- you can tell me, Mr. Ehrlich, but it looked like maybe
23 there was agreement as to the protocol.

24 **MR. JUDAH:** Largely. With respect to the forensic
25 protocol, Ms. Brewer has been on the ground on that, but I

1 think we're -- we either have an agreement or are very close.

2 **THE COURT:** All right. Maybe you, Mr. Ehrlich, can
3 tell me if there's any disagreement.

4 **MR. EHRLICH:** I think we're very close. I think
5 Ms. Brewer maybe wasn't able to answer whether some of the
6 small stipulations that we requested were agreeable, but I
7 can -- I can direct the Court to the conditions that we were
8 requesting to add are on the second page of our short brief
9 that we filed yesterday.

10 **MS. BREWER:** I can perhaps clarify.

11 So there is a forensic protocol that's being discussed.
12 That forensic protocol is simply with respect to an ability to
13 look at the forensic footprint of the native devices. So we
14 proposed to those who were involved and had an interest how
15 that would be done, and I think there's no disagreement with
16 respect to that.

17 **THE COURT:** Okay.

18 **MS. BREWER:** However, our request is to have an image
19 of the native devices themselves, and I think that is what is
20 in controversy.

21 **THE COURT:** Because you want to be able to search
22 those to see if there's anything missing --

23 **MS. BREWER:** Correct.

24 **THE COURT:** -- from that that was not on Relativity?

25 **MS. BREWER:** Correct. It would be a forensic and a

1 content analysis of those devices.

2 **THE COURT:** Okay. I think you understood that but you
3 can tell me.

4 **MR. EHRLICH:** Yes. I think there was some splitting
5 between what we're calling forensic review and content review.

6 I do understand that at least as to the devices that have
7 not been reviewed by anyone, we are agreeable, again with a few
8 conditions, to the proposed protocol, which I can discuss.

9 Our concern -- and I think Mr. Patchen shares it -- is to
10 the device that was harvested and imported into Relativity, and
11 we went through the process of screening out privilege and
12 privacy matters. We don't believe there needs to be any
13 content review of that device at all, but we understand there
14 may need to be some forensic review.

15 And so if we're limiting it to forensic review under the
16 basic terms of the protocol --

17 **THE COURT:** Okay.

18 **MR. EHRLICH:** -- that they asked for, we have no
19 objection with the caveat -- the most important caveat -- is
20 that we'd like to be provided with the reports, data, and
21 information extracted from that forensic image and have the
22 standard clawback rights to the extent there is an extraction
23 of anything.

24 **THE COURT:** So with respect to the devices that have
25 not been -- were not reviewed by Stroz but have been

1 forensically imaged, I assume by now --

2 **MR. PERLSON:** I don't think they've all been imaged
3 yet.

4 **THE COURT:** Well, they were starting it the last time.

5 **MR. EHRLICH:** Maybe Ms. Blunschi --

6 **THE COURT:** Yeah, Ms. Blunschi?

7 **MS. BLUNSCHI:** I can address that.

8 And just a minor clarification, though, on the distinction
9 between the forensic analysis and the content analysis. One
10 thing that we've, you know, been clear with the parties and
11 interested parties about is there is a difference between
12 Relativity and the native, particularly with respect to source
13 code.

14 **THE COURT:** Right. And videos --

15 **MS. BLUNSCHI:** Source code is not --

16 **THE COURT:** -- or at least they can't be accessed.

17 **MS. BLUNSCHI:** Yes.

18 **THE COURT:** Yeah. Okay.

19 **MR. PERLSON:** It's a significant issue.

20 **THE COURT:** Yeah. No, I understand that.

21 **MR. EHRLICH:** And I want to clarify.

22 **MS. BLUNSCHI:** Yeah.

23 **MR. EHRLICH:** We have no objection to review of the --
24 the device that's already been loaded into Relativity, if
25 there's source code or video files or other files that cannot

1 be reviewed, we have no objection to review for that.

2 **THE COURT:** Okay. So let's start, though, with the
3 devices that were not reviewed by Stroz and which I thought
4 that you were going to start to image. Have those been imaged?

5 **MS. BLUNSCHI:** Yes.

6 **THE COURT:** Okay. So those have been.

7 **MS. BLUNSCHI:** So those have been, yes. So those have
8 been imaged, but there is a variety of different kinds of
9 devices. So with respect to devices that were things like
10 simple desktop machines, those can be loaded up for review.
11 You know, merely imaging them, you know, essentially has them
12 ready to go.

13 Some of the devices turned out to be rather complicated.
14 The pieces are rather complicated homemade servers, so storage
15 arrays that Levandowski had constructed, and so imaging the
16 individual hard drives of those doesn't necessarily allow them
17 to be booted up, particularly not in a forensic software. So
18 the Stroz folks and the Discovia folks have been talking about
19 that to figure out --

20 **THE COURT:** And Discovia is Waymo's folks; is that
21 right?

22 I'm sorry. Go ahead.

23 **MS. BLUNSCHI:** Uh-huh, yes.

24 -- to try to figure out what the best way -- assuming
25 access to those materials is granted, what the best way to

1 stage them for review would be.

2 **THE COURT:** Okay.

3 **MS. BLUNSCHI:** So we have complied with imaging them.
4 That is done. It's just it's a pretty complicated process to
5 reconstruct these, you know, multiterabyte 20-drive servers
6 that were not, you know, constructed when we picked them up.

7 So I'm -- just sort of as an example, it's very important
8 for the drives to be in particular orders. If they are not,
9 you know, in that order -- and, as I understand it, they
10 weren't in storage -- there are a bunch of -- you know, many,
11 many different configurations that can be loaded and they have
12 to be loaded through forensic software to do that.

13 I know that the tech folks who have a better understanding
14 shared a mutual sigh of "Gosh, that sounds like a big project";
15 but we are optimistic that if access is granted, Discovia and
16 Stroz can cooperate to try to find the best way to make this
17 happen.

18 **THE COURT:** All right. So it sounds like they're
19 working on it in any event, but some of them are ready to go.

20 **MS. BLUNSCHI:** Yes.

21 **THE COURT:** So given that -- and now I'm just talking
22 to Mr. Ehrlich -- I'm not going to limit them to one terminal
23 at a time. If Mr. Levandowski has to have you hire other
24 attorneys, then sobeit, but we're not doing that.

25 **MR. PERLSON:** Well, this isn't a matter of examining

1 on a terminal, as I understand it. I mean, we need -- we get
2 the image and we have to apply things, and we need to get it.
3 We're not -- this isn't an issue of us going to -- like with
4 the database, of us going somewhere and having, you know,
5 attorneys looking through it.

6 And so it's not practical to have someone, you know,
7 hanging over our head while these folks are trying to work
8 through these incredibly complicated, you know, terabytes of
9 data.

10 **THE COURT:** Your protocol provides you giving them
11 access, what your --

12 **MR. JUDAH:** From the content piece --

13 **THE COURT:** Yes.

14 **MR. JUDAH:** -- but we also need the forensic metadata,
15 yeah.

16 **THE COURT:** Yes, I understand. The concern is the
17 content; right?

18 **MR. EHRLICH:** Yes.

19 **THE COURT:** Is that you're going to -- and then we
20 have the clawback issue; right?

21 **MR. EHRLICH:** Yes.

22 **THE COURT:** Yes. Okay. All right.

23 **MR. EHRLICH:** And we don't have --

24 **THE COURT:** But the only way it can be done is as a
25 clawback.

1 **MR. EHRLICH:** And we're talking about the content
2 here?

3 **THE COURT:** Yes.

4 **MR. EHRLICH:** Yes.

5 **THE COURT:** With respect to these devices.

6 **MR. EHRLICH:** I think just to clarify, we don't need
7 to be sitting there when they're doing the forensics for the
8 metadata and such. We understand --

9 **THE COURT:** No. We're talking about the content.

10 **MR. EHRLICH:** The content, that's -- we would like to
11 be there as their protocol suggested.

12 **MR. PERLSON:** Your Honor, this is not practical.
13 If -- you know, we've waited for all this time. Trial starts
14 days from now. How is it that we're going to be able to be
15 limited in reviewing the content of terabytes of data with
16 Mr. Ehrlich or one of his lawyers sitting over our shoulder?

17 **THE COURT:** But you're not. That's what I said.

18 There's going to be -- well, we'll talk about that. My
19 preliminary view is I don't think they've waived the privilege,
20 particularly not with devices that Stroz never reviewed; right?

21 If I -- let me give you an example. Now I'm switching to
22 the privilege waiver. If I leave my cell phone at home and I
23 need a contact and I'm bad, I don't back up my phone to the
24 cloud, so I call my house and my son answers the phone. I say,
25 "Can you get my contact?" And I give him my password. So now

1 he has my phone and he has it all day with access to it. Are
2 you going to argue that I've waived the privilege as to my
3 attorney-client privilege documents on my phone? No.

4 **MR. PERLSON:** I don't think that has anything to do
5 with the situation here at all.

6 **THE COURT:** Well, we're talking about devices that
7 they had that they never accessed. So actually it has less to
8 do with the situation because in my example --

9 **MR. PERLSON:** I don't agree with that, Your Honor.

10 **THE COURT:** -- he accessed it.

11 Why not?

12 **MR. PERLSON:** Because they gave them to them for them
13 to look.

14 **THE COURT:** I gave my phone to my son to look through
15 it.

16 **MR. PERLSON:** You didn't give your phone to your son
17 so that you could get into a transaction because they wanted to
18 look at your stuff in order -- before buying a company for
19 \$680 million. That's just a completely unrelated situation.

20 That actually sounds like something that might be an
21 inadvertent thing because you didn't expect him to go looking
22 around here. But here, I mean, it's just not even remotely
23 comparable to the situation that we're talking about.

24 **THE COURT:** What about, though, what they told him --
25 they told Stroz not to review the privilege and they gave them

1 the names of the attorneys and the like, which is just --

2 **MR. PERLSON:** So?

3 **THE COURT:** -- the *Fishman* [sic] case out of
4 New Jersey.

5 **MR. EHRLICH:** *Fishoff*.

6 **THE COURT:** *Fishoff*?

7 **MR. EHRLICH:** Yeah.

8 **THE COURT:** Out of New Jersey.

9 **MR. PERLSON:** I thought that the cases that they were
10 citing had to do with a litigation or government investigation.

11 **THE COURT:** It was a government, but what's the diff?

12 **MR. PERLSON:** Well, the diff is that it's a completely
13 different situation. You're being forced into doing something.
14 It's just like a litigation.

15 **MR. EHRLICH:** No, no.

16 **THE COURT:** No, no, no. There is no force. There
17 wasn't any subpoena. It was a voluntary compliance, which, by
18 the way, the Ninth Circuit has made clear there is no common
19 interest privilege with respect to that, which the parties have
20 argued. There is not.

21 So if it was a selective waiver, they couldn't do it. You
22 cannot do selective waiver. I agree with you. It would be one
23 thing if they reviewed the documents. Then that's a selective
24 waiver, but here what we have is the evidence before the Court
25 is that they were not reviewed. They were not reviewed, and

1 particularly we know that on devices they never looked at.
2 They handed them the phone. That's it. They were not
3 reviewed.

4 **MR. PERLSON:** Well, they handed them a lot more than a
5 phone.

6 **THE COURT:** Well, a computer hard drive --

7 **MR. PERLSON:** Well, they handed all the --

8 **THE COURT:** -- but they were not looked at.

9 **MR. PERLSON:** So, you know, it's fine to talk about
10 them differently. You know, frankly, Your Honor, to us, in a
11 government investigation where there's a policy interest,
12 perhaps like in litigation, to have these things out there and
13 shared, that's the basis, as I understand it, of, you know,
14 allowing the situation.

15 If I enter a situation --

16 **THE COURT:** That would be an argument, then, for
17 actually allowing a common interest privilege to extend that
18 far as well if all we were thinking about is, well, we want to
19 encourage that disclosure, would it not?

20 Let's put it this way --

21 **MR. PERLSON:** But the point is that it's a third party
22 that they've provided it to.

23 **THE COURT:** Yes.

24 **MR. PERLSON:** And they've undertaken the risk that they
25 were giving it freely and voluntarily to this third party.

1 That's an entirely different situation than a government
2 investigation. This is a commercial transaction that these
3 people voluntarily gave their stuff over because they want --
4 because it was being asked by the other party and they said,
5 "Okay. Here you go."

6 And the fact that it was blocked from being transferred to
7 somebody else doesn't make a difference. They gave it to Stroz
8 and Stroz was able to access any of it.

9 **THE COURT:** Could but there was the letter from
10 March --

11 **MR. EHRLICH:** 7th.

12 **THE COURT:** -- 7th saying don't.

13 See, this is the issue. None of the cases anyone cited,
14 it seems to be it's a unique situation which happens a lot in
15 this case --

16 **MR. PATCHEN:** Correct, Your Honor.

17 **THE COURT:** But what you're really arguing is, you
18 argued, well, the attorney-client privilege is strictly
19 construed. There's no dispute as to the application of the
20 privilege. We're talking about waiver, and what you're arguing
21 is that waiver should be liberally applied. I don't know if
22 that's the case. I don't know what case says that; right?

23 **MR. PERLSON:** The general proposition is that when you
24 give your stuff to a third party, you waive it.

25 **THE COURT:** Yes, but every case you cited involved the

1 third party reviewing the documents and not one of the cases
2 involved what we have here, which says "I'm giving you" -- see,
3 this is a digital world that we live in. It's a different
4 time -- "I'm giving you access to my e-mail" -- that's
5 *Fishoff* -- "I'm giving you access to my e-mail because it's too
6 hard and too difficult and too time-consuming and too expensive
7 to go through and actually pull the stuff out. So here,
8 Government, I'm giving it to you voluntarily because I don't
9 want you to prosecute me and you want to see it." It's
10 similar. The only difference is it's the government. That's
11 all.

12 **MR. PERLSON:** That's a pretty big difference,
13 Your Honor, frankly.

14 I mean, what's the policy interest in allowing
15 Levandowski, Ron, and all these other individuals to hand over
16 their things so that another commercial entity can review them
17 to decide whether they've stolen enough stuff so that they
18 don't want to buy them?

19 **THE COURT:** No. The question is if they handed over
20 their privilege materials, if they allowed them to review it,
21 then you're right. Waiver. They can't do that. There's no
22 selective waiver.

23 **MR. PERLSON:** But they asked them -- they asked them
24 not to do it, but --

25 **MR. JUDAH:** Yeah. I mean, Your Honor, admittedly we

1 don't know exactly what was touched by Stroz at any point, but
2 the March 21st protocol expressly provides that Stroz is
3 allowed to include privilege communications in the final report
4 if they deem it relevant.

5 So what happened in the March 7th letter, which I don't
6 believe is even referenced in the Stroz report, I don't
7 understand it to have any operative agreement with respect to
8 what Stroz was doing with its clients, which were not
9 Mr. Levandowski --

10 **THE COURT:** What did they say at their deposition?

11 **MR. EHRLICH:** Stroz?

12 **MR. PATCHEN:** It's scheduled for tomorrow.

13 **MR. JUDAH:** It's tomorrow.

14 **THE COURT:** Well, maybe it's just that it's premature
15 because as the record looks now, but I did look at the protocol
16 and it didn't seem to necessarily follow what was in that
17 March 7th letter.

18 **MR. EHRLICH:** So --

19 **MR. PATCHEN:** Your Honor, it very clearly did not.

20 **MR. EHRLICH:** -- there is some ambiguity; and as
21 Mr. Gardner in his declaration explained, he took great pains
22 to ask -- to ensure that privilege materials were segregated.
23 And under page 1 of the protocol at Footnote 1 it says, "Stroz
24 will use its own algorithms and the names you provided,"
25 O'Melveny is referenced as the group including the individual

1 diligence employees' counsel, "to segregate."

2 **THE COURT:** But it's in the -- it is in the protocol
3 then.

4 **MR. EHRLICH:** It is in the protocol, and I think
5 Mr. Judah is pointing out there's some ambiguity about what
6 happens if despite best efforts, privilege material makes it
7 into the proposed disclosure folder. Then there is provision
8 for, you know, maybe the sides can take different views about
9 whether it's actually privilege.

10 But it is very clear that step one, and I can point you to
11 the page if --

12 **THE COURT:** Yeah.

13 **MR. EHRLICH:** -- is to call out potentially privilege
14 materials that then would be submitted to counsel for review
15 and the preparation of what is termed a privilege list.

16 And I think it's also important that the very last
17 communication on the point that Mr. Gardner got from Stroz was
18 the April 1st e-mail, which is Exhibit H to his declaration,
19 from Hanley Chew, one of my former colleagues at the
20 U.S. Attorney's Office, saying, "We are preparing to segregate
21 potentially privileged documents," and asking for some clarity
22 on other attorneys they should add to the list.

23 That's April 1. By April 11, the Court has held there's
24 clearly a common interest privilege. So there, I think,
25 everything April 1 forward --

1 **THE COURT:** I wouldn't say "clearly." It was a
2 difficult division.

3 **MR. EHRLICH:** I'm sorry. It's definitively.

4 But there you, I think, would clearly then invoke the
5 nonwaiver doctrine of the common interest privilege. So
6 disclosing -- even intentionally disclosing privilege to a
7 common interest party is not a waiver.

8 So it's -- the point is: What was done between late March
9 when Mr. Levandowski provided the devices and April 11th? Was
10 there not the possibility that somebody could look at something
11 but an actual intentional voluntary disclosure of content?
12 That is the key, and the *Fishoff* case is absolutely on all
13 fours.

14 **THE COURT:** Well, the key in this last question
15 creates an ambiguity that they were being permitted to actually
16 review -- different from the March 7th letter -- to actually
17 review to determine if it was relevant or not.

18 **MR. PERLSON:** Exactly. There is --

19 **THE COURT:** That, I think, would be a waiver.

20 **MR. EHRLICH:** There is ambiguity. I think that what
21 we're talking about are steps taken by counsel; that, you know,
22 there are times where there's ambiguity in agreements,
23 understood.

24 I think Ms. Baker on behalf of Mr. Ron had the same
25 understanding, that this was a process first of culling out,

1 segregating; and the fair inference before April 11th, if Stroz
2 doesn't come back and say, "Here are some documents you need to
3 review for privilege," the inference is there were no hits.

4 **THE COURT:** Well, I'm not going to draw an inference.
5 You're going to take Mr. Friedberg's or somebody's deposition
6 tomorrow and you can ask him and find out because there is an
7 ambiguity.

8 My holding is based on my belief that they didn't review
9 them. For example, in litigation all the time, all the time I
10 tell parties "Just disclose it and do a clawback." That's what
11 we have to do. And I don't agree with you. And that's what
12 they did in *Fishoff*. If that's the case, then I'm not going to
13 find a waiver; but if that's not what was done, then I'm likely
14 to find a waiver.

15 **MR. PERLSON:** Can I just say that -- can I just
16 read -- I, frankly, don't see there to be any ambiguity here.
17 What it says in the agreement is (reading):

18 "Notwithstanding the foregoing but subject to the
19 examination protocol, nothing in this letter prohibits
20 Stroz from reporting to its clients, if applicable, at the
21 end of the Stroz examination any portion of the Aspen
22 information which Stroz, in the opinion of Stroz," totally
23 in their own discretion, "believes" -- I actually added
24 the "totally in its own discretion," that was my
25 embellishment, sorry -- "believes constitutes factual

1 information which may relate to or be relevant to a
2 potential breach, any fiduciary duty, duty of loyalty, or
3 other confidentiality, nonsolicitation, noncompetition, or
4 other obligations based in contract, statute, or otherwise
5 as defined by the clients."

6 And I think it's very important to remember the context of
7 what this investigation is all about. You know, they're trying
8 to investigate purportedly what was actually going on and
9 whether these people were, you know, committing bad acts or,
10 you know, whether they had Waymo confidential information and
11 the like.

12 And so this provision is specifically in there so that
13 they can use factual information if it's in these materials.
14 And what -- you know, frankly it seems that's precisely what
15 they're trying seemingly, or perhaps, to protect is those very
16 things and which is exactly the relevance here.

17 And then, additionally --

18 **MR. PATCHEN:** If I could add --

19 **MR. PERLSON:** Let me just finish my points. I have a
20 couple more points.

21 Also, I think it's very important to recognize here too
22 that it's not just a blanket privilege across the board. There
23 is an Otto privilege.

24 **THE COURT:** No, we'll get to that. We'll get to that.

25 **MR. PERLSON:** Okay.

1 **THE COURT:** Because I didn't see any opposition from
2 Otto; is that right?

3 Yeah, we'll get to that, what Mr. Ron asserted the
4 privilege on behalf of Otto, which I don't believe he can do.

5 **MR. JUDAH:** If I can just make one other point, which
6 is there was a discussion of revising that March 21st protocol
7 that Uber wanted to do, and John Gardner rejected that. That
8 happened after April 1st. I was just deposing Ottomotto's
9 30(b)(6) witness on the Stroz investigation this morning.

10 So March 21st is the operative agreement, and there's no
11 evidence that any privilege pulls were ever done.

12 **THE COURT:** I don't know what Stroz reviewed. You're
13 going to take their deposition tomorrow. Ask them.

14 **MR. EHRLICH:** Can I call attention to one critical
15 sentence?

16 **THE COURT:** Yes.

17 **MR. EHRLICH:** Page 1 at the very bottom of the
18 protocol it says -- and this is attached as Exhibit F -- it
19 says (reading):

20 "At the end of its investigation, if Stroz Friedberg
21 believes that nonprivileged relevant documents or
22 communications should be shared with O'Melveny," which is
23 then Uber's counsel, "it will first place those documents
24 in a proposed disclosure folder."

25 **MR. PERLSON:** O'Melveny was not -- I don't think you

1 meant to say that, but I don't think O'Melveny was Uber's
2 counsel. It was Otto's counsel.

3 **MR. EHRLICH:** I didn't. I misspoke.

4 To O'Melveny and Morrison. So it included Uber's counsel
5 there.

6 But the point is I do recognize there's possible ambiguity
7 in whether Stroz could ever look at a document that is later
8 claimed to be privilege.

9 But the clear effort, and certainly in the lead-up to this
10 protocol, the clear effort repeated instruction and apparent
11 acceptance by Stroz is they are going to segregate privilege
12 documents and allow them to be reviewed.

13 **THE COURT:** I'm not going to guess. They're taking
14 their deposition tomorrow.

15 **MR. EHRLICH:** But --

16 **THE COURT:** We can find out what they say and what
17 they did.

18 **MR. EHRLICH:** But --

19 **THE COURT:** No, because I do think it matters. They
20 can clear up the ambiguity and they can say what they were told
21 and what they thought, and all that.

22 **MR. EHRLICH:** Can I just say, the *Fishoff* case, it
23 doesn't turn on whether somebody, contrary to your expectation,
24 whether somebody happens to look at privilege documents. The
25 issue is whether the privilege holder or their proxy, here the

1 counsel, takes an affirmative step to knowingly and
2 intentionally reveal content.

3 **THE COURT:** Yes, but let me tell you what I think. I
4 understand that, but here's why there's an ambiguity.

5 There was on March 7th a very clear direction. I don't
6 see that direction repeated. And the March 7th letter said,
7 "You are not to review that. You identify it. You segregate
8 it. You don't review it." That is never repeated in any of
9 the exhibits that I've seen to your exhibit. That's where --
10 so I don't know what happened in the interim. I don't know.
11 That's what Mr. Friedberg can say.

12 Mr. Gardner doesn't say here, "I repeated." He wrote
13 those letters saying, "I want to make sure you're complying
14 with the protocol," but the protocol itself doesn't say, does
15 it, "You are not to review documents that you identify as
16 privileged"? It doesn't say that.

17 **MR. EHRLICH:** It doesn't say it as crisply as you just
18 said it, but --

19 **THE COURT:** As crisply as Mr. Gardner said it on
20 March 7th. He knew how to say it, and Ms. Baker used the exact
21 same words so they were talking, I think.

22 **MR. PATCHEN:** No comment.

23 **THE COURT:** So it's not that he didn't know how to say
24 it because he said it crystal clear, I agree with you, exactly
25 like *Fishoff*, on March 7th. The protocol itself doesn't say

1 that. I don't know why and Mr. Friedberg can answer why.

2 **MR. EHRLICH:** And in fairness, I don't think *Fishoff*
3 is quite so strong. *Fishoff* is just an attorney handing over
4 e-mails saying, "We do not intend to preclude our ability to
5 object on attorney-client privilege grounds.

6 **THE COURT:** No, no, no. I don't think so. There was
7 an agreement with the government that they would return, if I
8 understand, that they would return -- not review and return
9 privilege documents.

10 **MR. EHRLICH:** I was not able to tell that from the
11 case itself.

12 **THE COURT:** All right.

13 **MR. EHRLICH:** Maybe that's in the record below, but
14 what I -- from the case as I read it, there is a -- both the
15 government and this individual were saying that the company,
16 the delivery of a hard drive and the entire contents of e-mail
17 accounts, there was an e-mail from counsel saying -- stating
18 (reading):

19 "By correspondence dated June 25, 2015, counsel for
20 Petrello expressly stated that," quote, "'Petrello is not
21 waiving any rights he has to preclude the DOJ from
22 reviewing or utilizing any privilege communications,
23 including communications subject to the attorney-client
24 privilege.'"

25 And then it provided names. And so I don't -- it's framed

1 as a clawback agreement, but I don't actually see any direct
2 instruction like you're suggesting that "You, U.S. Attorney's
3 Office, may not lay human eyes on a privileged communication."
4 It's saying "I'm not waiving it."

5 **THE COURT:** Well, you have to lay eyes on it to
6 identify its privilege.

7 **MR. EHRLICH:** Right.

8 **THE COURT:** And there's a difference between that and
9 saying "You're not" -- there's a difference between saying
10 "Don't lay eyes on it if it's privileged" and saying "You can
11 review it to determine if it's relevant and then we'll put it
12 on a privilege log."

13 **MR. EHRLICH:** Right.

14 **THE COURT:** I don't know how Stroz can place something
15 on a privilege log without reviewing it. So that's your,
16 quote, "ambiguity."

17 **MR. EHRLICH:** But they're not doing the privilege log.
18 They're doing --

19 **THE COURT:** What does the protocol say?

20 **MR. EHRLICH:** The protocol says they will use the list
21 of names. It's Footnote 1.

22 **THE COURT:** Uh-huh.

23 **MR. EHRLICH:** After they -- it's after explaining that
24 we're just going to be putting nonprivilege documents in a
25 proposed disclosure folder. It says "We will use the list of

1 names provided, our own algorithms..."

2 **THE COURT:** Oh, and then O'Melveny will create.

3 **MR. EHRLICH:** And O'Melveny, which was defined to
4 include our individual counsel, and O'Melveny will then come
5 back with a privilege list.

6 **THE COURT:** Ah.

7 **MR. EHRLICH:** So Stroz is not doing that.

8 **THE COURT:** I thought Stroz was. I misread it.

9 **MR. EHRLICH:** And Mr. Gardner and presumably Ms. Baker
10 are sitting there waiting, "I guess there's nothing privilege
11 that we need to worry about. Phew."

12 Then April 11th happens. So it doesn't matter what Stroz
13 did if they weren't given permission ever to go to privilege
14 communications.

15 **THE COURT:** Let's find out. What I'm saying is this
16 today, I don't see enough here to find a waiver. Let's see
17 what Stroz says. You haven't deposed him yet. I assume you
18 haven't deposed Mr. Gardner yet.

19 **MR. JUDAH:** Mr. Gardner is on Friday, I think, and
20 we're also seeking the depositions of two additional Stroz who
21 are --

22 **THE COURT:** I'm not in a position -- I only briefly --
23 I can't discuss that, but I will rule on it imminently, but I
24 can't -- the motion for the additional depositions I can't hear right
25 now.

1 All right. So --

2 **MR. JUDAH:** If I can just make one other point --

3 **THE COURT:** You may.

4 **MR. JUDAH:** -- which is, it seems, based on what Waymo
5 has been able to gather so far, that a lot of what was supposed
6 to be done was not necessarily done due to the speed and the
7 rushed deadlines and the underlying data.

8 So I would say even if -- even to the extent there was
9 supposed to be this foldering and then the privilege review
10 from O'Melveny, just because Stroz didn't provide something to
11 O'Melveny doesn't mean they weren't looking at things and, in
12 fact, had the ability to do so the whole time.

13 **THE COURT:** Take the deposition and we'll find out
14 what they say they did. Okay?

15 But to your argument, I guess I'm prepared to say -- to
16 extend *Fishoff* to sort of just the general situation. I
17 actually do think in the digital world that we should be
18 mindful of the incredible cost and expense that digitizing
19 everything has created and that there are ways of getting
20 around that. Whether it be to facilitate a transaction, I
21 think that's okay. There's nothing right on point. That's
22 just my judgment, I guess, but there we are, especially in the
23 absence of any case that waiver should be construed liberally.

24 We're not talking about the privilege. We all agree that
25 these documents are privileged, at least generally. The

1 question is waiver. Waiver and how liberally, how easily do
2 you find a waiver. That's really the question here, I guess.

3 Because there's no question -- and if you think about the
4 purpose behind waiver is -- or the reasoning behind it is if
5 they were willing to show it to this person, then they would
6 have gotten that legal advice to begin with, notwithstanding
7 the protection.

8 There's no way I would find that on this record. There's
9 no way I would find that on the record. At the time whatever
10 these communications are that we're talking about, I mean,
11 Mr. Gardner and Ms. Baker clearly were trying to segregate out
12 the privilege. So I couldn't find that. So the whole reason
13 for waiver doesn't really apply here.

14 Anyway, anyway, but I'll -- I'm not going to find a waiver
15 now. It's without prejudice to whatever you discover.

16 It's all collateral, though, in any event; right? It's
17 all collateral. Getting the privilege stuff is collateral to
18 proving your case; but, nonetheless, you have the right, if
19 they did waive it, to get it.

20 **MR. PATCHEN:** And, Your Honor --

21 **THE COURT:** So -- oh, but let's address something
22 else, though, with Mr. Ron, which is the vast majority of the
23 documents on your privilege log you say is a privilege that
24 belonged to Otto, and I assume by that that meant Ottomotto.

25 **MR. PATCHEN:** I think the Inc. before there was the

1 LLC. So the defunct corporation Ottomotto, Inc. It was
2 eventually converted into an LLC when it was part of the merger
3 agreement, but the defunct corporation at the time it was
4 handed over was Inc., and so Mr. Ron, as an executive of Inc.,
5 has standing to make that privilege claim considering --

6 **THE COURT:** Well, Ottomotto was incorporated when?

7 **MR. PATCHEN:** I believe in January --

8 **THE COURT:** 2016.

9 **MR. PATCHEN:** Yes. Two days after Mr. Ron left.

10 **THE COURT:** Okay. So but there are entries on the
11 privilege log that are for, like, corporate advice that are in
12 2015.

13 **MR. PATCHEN:** Yes. They would be sort of
14 promoter-type. It hadn't been formed yet, but it was for the
15 intent of forming the corporation. You go to a corporate --
16 you know, you go to corporate counsel, "I want you to form this
17 corporation." It doesn't exist yet, but it's -- obviously
18 that's the point of why you're having those conversations.

19 **THE COURT:** All right. I don't know about that, but I
20 think the stuff, once it's incorporated, it then got merged or
21 purchased by Uber, and even the case that you cited says that
22 the privilege goes with the company. That privilege is now
23 held by Uber.

24 **MR. PERLSON:** Right.

25 **THE COURT:** Mr. Ron doesn't have any standing to

1 assert it.

2 **MR. PERLSON:** That was our point, that there's no --
3 yeah, that he has no standing to assert the privilege; and
4 Uber, while we have fought about many things, this is not a
5 privilege for this log being asserted by Uber.

6 **THE COURT:** So with respect to his assertions on
7 behalf of Otto, I don't know about the pre-incorporation. I
8 don't know about that. I don't know that it matters.

9 **MR. PATCHEN:** I don't think --

10 **THE COURT:** It matters; right?

11 **MR. PATCHEN:** It's actually a difficult question. I
12 didn't see the standing issue particularly briefed in this, and
13 I would be happy to submit supplemental authority, but I think
14 it's a tricky issue when you have corporate documents that are
15 in Mr. Ron's personal gmail. This is not his Otto account that
16 was transferred over. This is in his gmail.

17 **THE COURT:** I've already addressed that issue.

18 **MR. PATCHEN:** I understand.

19 **THE COURT:** I think it's absolutely preposterous --
20 well, that was Otto Trucking.

21 **MR. PATCHEN:** I'm not saying that it's not being
22 produced. What I'm saying is that in terms of when things were
23 collected and otherwise, I think it's appropriate for him to
24 assert that privilege.

25 **THE COURT:** It is not. He is not -- he has no

1 standing whatsoever. Otto's privilege went with Otto to Uber.
2 Only Uber. That's not a tricky question. That's well
3 established that the privilege doesn't -- you even say -- is he
4 an officer of Ottomotto today?

5 **MR. PATCHEN:** I don't believe -- I don't believe so,
6 Your Honor.

7 **THE COURT:** No. So he can't waive Ottomotto's
8 privilege. He can't assert Ottomotto's privilege. Under that
9 reasoning, anybody who was at the company before it got
10 acquired by someone else could assert the privilege on behalf
11 of that company because at the time the document was created,
12 they were an officer at the time. That doesn't make any sense.
13 It goes with the company and Uber would have the right.

14 So I don't think it applies to any of those documents as
15 opposed to his personal privilege is another matter. So I'm
16 not saying that he waived. I'm saying he had no right to waive
17 or not waive --

18 **MR. PATCHEN:** Okay.

19 **THE COURT:** -- with respect to Otto's privilege, but
20 his personal I'm not holding that he waived for the same reason
21 as Mr. Levandowski.

22 **MR. PATCHEN:** Understood, Your Honor.

23 **THE COURT:** Okay. Now, there was another issue,
24 though, that was raised with respect to privacy objections but
25 hits coming up on those things.

1 **MR. PERLSON:** Yeah. And I'm still, frankly, not
2 entirely sure where we've settled on that in between. Now, we
3 were talking about the devices that had not been imaged, and
4 I'm still confused. I'm not certain whether we finished on
5 that.

6 **THE COURT:** I got it. So, anyway, so now we
7 understand the privilege issue, but it all has to be a clawback
8 because you have to review them. You, then, under your
9 protocol are sharing what you're identifying -- right? -- as
10 relevant.

11 At the end of the case you're returning everything to them
12 so they don't get to keep it, anything you're not identifying,
13 in other words. You don't get to keep the image of the devices
14 forever.

15 **MR. PERLSON:** Okay.

16 **THE COURT:** Yeah. Right. So you get it back.

17 And they identify anything they say is relevant, and then
18 you have the opportunity to say, "No, it's not relevant," or,
19 B, "It's private or it's privileged."

20 **MR. EHRLICH:** Right.

21 **THE COURT:** Yeah.

22 **MR. EHRLICH:** This is for we're talking about the
23 devices never reviewed?

24 **THE COURT:** Correct.

25 **MR. EHRLICH:** Correct. So we would -- we would want

1 to get anything they extract or effectively print from these
2 devices in sufficient time so we can raise those objections,
3 and I think the issue that was causing concern was whether we
4 could be there next to them as they're reviewing for content to
5 ensure, as they suggested, that they're only looking at
6 appropriate materials.

7 There had been an unfortunate incident early on in the
8 review here, and we just want to avoid that, but we also think
9 it's appropriate that they not use this as *carte blanche* to
10 just look at privilege communications between Levandowski and
11 Gardner and other attorneys.

12 **THE COURT:** Well, let me ask you in *Fishoff*, how was
13 that taken care of? It wasn't; right?

14 **MR. EHRLICH:** I don't think it was. I mean, I think
15 what happened is that you have a defendant who was charged by
16 criminal complaint who wanted to cooperate and as part of that
17 cooperation, handed over devices and the entire contents of
18 e-mail accounts, which, frankly, e-mail accounts are easier to
19 rifle through and get rid of privilege.

20 But it was handed over to the government. There's no
21 selective waiver doctrine. The government turned it over to
22 the SEC and it got produced to another defendant. And so then
23 the argument became: Was that wholesale waiver?

24 But as far as I could tell from the opinion, maybe
25 there's -- in the court record there's more clarity, there was

1 no effort to actually physically prevent review of privilege.
2 It was just a statement.

3 **THE COURT:** No, no. I'm saying these are documents we
4 know Stroz did not review --

5 **MR. EHRLICH:** Correct.

6 **THE COURT:** -- anyway, but you still -- we know that.

7 **MR. EHRLICH:** Except to the extent they're duplicates,
8 but I don't know what's in there at all, yes.

9 **THE COURT:** Yeah. But I guess what I'm saying is, I
10 understand. Too bad. We just don't have time. They'll
11 provide it to you. You can claw it back, but sort of this
12 metaphysical thing we don't want them to review, see, they
13 can't use, they recognize that. It's not the government. So
14 that -- you know, and it can't be turned over to the government
15 because they won't ever possess --

16 **MR. EHRLICH:** So could we have -- we have to have an
17 accurate record of everything they pull.

18 **THE COURT:** That's what I understand that they're
19 agreeing to.

20 **MR. EHRLICH:** And maybe this is something that we
21 can --

22 **THE COURT:** Mr. Judah, maybe you can say that.

23 **MR. PERLSON:** Well, so there's two things. One, so to
24 the -- for example, to the extent that we're looking at content
25 and we find something that's relevant, you know, you've got to

1 put a Bates number on it or something or else we're not going
2 to be able to use it. And so to the extent that that's what
3 we're talking about, fine.

4 But, you know, when someone is looking at a forensic
5 examination and looking at things and trying to figure out, if
6 they can figure out, you know, what was sent where or what was
7 deleted when or that sort of thing, that's not something that
8 you can, like, put a Bates number on.

9 **THE COURT:** No. We're talking about the content
10 review.

11 **MR. EHRLICH:** Of course, we're talking about the
12 content review, and I understand eventually it would have to
13 get a Bates number to be used.

14 But I'm not only here to -- I'm not only concerned with
15 what gets used in this case, as the Court knows. We expect
16 there's communications with investigating authorities.
17 Judge Alsup referred the matter for a criminal investigation.
18 I'm concerned with what is taken that we have an opportunity to
19 know about it and claw it back because I know that the courts
20 have ruled against us thus far, but there's no final decision
21 on the Fifth Amendment.

22 **THE COURT:** No, no, no, I understand. I understand.

23 So maybe, Mr. Judah, you can explain on the record what
24 the protocol is and what Waymo will do.

25 **MR. JUDAH:** So for the devices that have not been

1 reviewed by Stroz, Waymo receives the forensic images. Our
2 Discovia personnel can work with Stroz as appropriate to
3 determine whatever forensic analysis data we need. Discovia
4 will conduct its own analysis too. And then our reviewers will
5 review it; and then to the extent there is anything on it that
6 we want to use the content of that's relevant content, then we
7 produce it to the other side.

8 **THE COURT:** Okay. Anything that you keep.

9 **MR. JUDAH:** Right.

10 **THE COURT:** So, in other words, what Mr. Ehrlich is
11 concerned about is that Waymo keeps in its possession anything
12 or shares with anyone. So anything like that. So the
13 representation is to the Court that anything that you would
14 ever have in your possession, whether you use it in the case or
15 not, you will share it with the other side.

16 **MR. EHRLICH:** Anything extracted from these devices.

17 **THE COURT:** Right.

18 **MR. JUDAH:** Yeah, anything extracted, and so --

19 **MR. EHRLICH:** Not just kept, which can mean a lot of
20 things, but extracted now.

21 **MR. JUDAH:** And the only sort of caveat I want to make
22 is that because I don't know exactly what the format is and we
23 don't know -- it's difficult for me to say "'Extraction' means
24 X, 'extraction' means it comes off of this onto a hard drive as
25 a JPEG versus" -- we don't know what the content is so it's

1 difficult to say; but we can make the representation that
2 anything extracted -- basically there's going to be a native
3 image and there will be an analysis of the native image. And
4 then things will be extracted from what can we just return or
5 destroy in the native image and take it off that and put it
6 somewhere else, and that is the stuff that we will disclose.

7 **MR. EHRLICH:** If it's done timely, I accept that.

8 **THE COURT:** Okay. All right. I assume Mr. Patchen
9 does too.

10 **MR. PATCHEN:** That's fantastic.

11 **MS. BLUNSCHI:** And just to clarify on behalf of Stroz
12 then, we will go ahead and provide the native images directly
13 to Waymo and Discovia without having to stage a review room, or
14 something like that.

15 **THE COURT:** Correct. Correct. And that should be
16 done ASAP.

17 **MR. EHRLICH:** And I just want clarity on the
18 representation that this extraction -- that we get anything
19 that is extracted includes the forensic information, the
20 metadata that you're pulling off of the machines.

21 **MR. JUDAH:** Yes. Yes.

22 **MR. EHRLICH:** Okay. And --

23 **MR. PERLSON:** To the extent it's something that you
24 could even -- I mean --

25 **MR. JUDAH:** Right.

1 **MR. PERLSON:** -- I'm not sure that that's really
2 viable necessarily.

3 **THE COURT:** Well, let's let Ms. Brewer speak.

4 **MS. BREWER:** I think, if I'm interpreting your comment
5 or question correctly, the artifacts that were in the forensic
6 protocol that we proposed and discussed in the call yesterday
7 is what you're asking --

8 **MR. EHRLICH:** Correct.

9 **MS. BREWER:** -- for.

10 Okay. And the complication we had yesterday is that
11 Stroz's counsel interpreted that as something they would have
12 to provide at the same time as the native image, which is a
13 burden to them.

14 But as I understand it, it was decided today is that the
15 native image would be provided to us, and your request is that
16 the artifacts from that native image be provided to you.

17 **MR. EHRLICH:** Yes.

18 **THE COURT:** I hope you understand what she's talking
19 about because I don't.

20 **MS. BREWER:** I hope I understood it too.

21 **MR. PATCHEN:** Your Honor, for example, things like the
22 registry file and the log files for when devices were plugged
23 in or not are not technically like native content files but
24 those are also files that can be provided.

25 **THE COURT:** I see.

1 **MR. PATCHEN:** Those are the artifacts.

2 **THE COURT:** Okay.

3 **MS. BREWER:** It is like a Table of Contents for the
4 device, and it's about two pages long or I would articulate it
5 better.

6 And I am honest that I'm not the best to articulate what
7 all of those things on the several-page document is but we have
8 disclosed it, discussed it with Stroz's counsel, so that the
9 forensic consultants on both sides involved are in agreement
10 that they understand what those artifacts are.

11 And, as I understand it, you're interested in receiving
12 those, so...

13 **MR. PATCHEN:** Yes.

14 **MR. EHRLICH:** Yes.

15 **MS. BLUNSCHI:** And this is Melanie on behalf of Stroz.

16 I can confirm that Linda and I had a call with Stroz and
17 Discovia in which -- the sort of experienced forensic
18 examiners -- we both agreed that the list of information that
19 Waymo was requesting was very industry standard.

20 And as she alluded to, the only concern we had was whether
21 Stroz would be running these additional forensic analyses for
22 Waymo or whether Discovia would go ahead and run them
23 themselves; and where, I think, we landed was that Discovia
24 would do that work themselves.

25 **MS. BREWER:** I don't know that we did land there, but

1 if that is how we can move forward, I think that we don't
2 object to doing that.

3 My understanding is it's not instantaneous. It is -- and
4 that is what --

5 **MS. BLUNSCHI:** It is not, yes.

6 **MS. BREWER:** Yeah.

7 **THE COURT:** All right. So my understanding is Waymo
8 is willing to share with you whatever they can. They're not
9 willing to do it necessarily in a way that's going to slow them
10 down.

11 **MR. EHRLICH:** Right. But the understanding is that
12 all of the forensic listing of information is going to be
13 provided to us at the same time as it's prepared by Discovia.

14 **MR. PATCHEN:** Well, in the sense that it won't be slow
15 rolled. They have it for a day and then turn it over.

16 **MR. EHRLICH:** Can I give an example?

17 One of the artifacts on a four-page list is a listing of
18 every single file on every computer. Perhaps that doesn't
19 disclose any content. They've also asked for the entire Web
20 search history on every possible browser.

21 So there may be things that are off limits potentially,
22 hopefully not, and it is Mr. Levandowski's information that
23 they're extracting and we just want to get the same report that
24 Waymo is getting around the same time. It doesn't need to be
25 instantaneous. Just so the clawback rights, if they need to be

1 employed, are meaningful.

2 **MR. PERLSON:** Your Honor, we'll try to find a
3 practical way to do that; but, you know, yeah, it's -- it's a
4 very short amount of time, and we're only going to be able to
5 spend a limited amount of time putting -- depending on the size
6 of the data, importing it to somewhere else, but we'll do the
7 best we can.

8 **THE COURT:** Yeah. I mean, you offered to do it as
9 part of the protocol, so --

10 **MR. JUDAH:** Right. And the other -- I don't know
11 what -- I mean, it depends when Quinn Emmanuel gets it as
12 opposed to Discovia. I don't -- so, you know, we will promptly
13 provide it and we will not be slow rolling.

14 **THE COURT:** I mean, perhaps Discovia at the same time
15 they provide it to you, they can provide it to Mr. Ehrlich.

16 **MR. EHRLICH:** That would be my request.

17 **MR. JUDAH:** The only reason I don't know about that is
18 I don't know who's interfacing, and we may want to keep e-mail
19 chain things, but it will be promptly.

20 **THE COURT:** Mr. Ehrlich should be on your speed dial.

21 (Laughter)

22 **THE COURT:** Okay.

23 **MR. EHRLICH:** Thank you.

24 **THE COURT:** All right. So that takes care of the
25 device -- those hundred or so devices that have never been

1 reviewed.

2 Now we have the native files that the Relativity database
3 was made from, although we do know the source code files and
4 the video files could not be reviewed in Relativity, so those
5 are going to be reviewed and we don't have any concerns about
6 content there.

7 **MR. JUDAH:** The issue with that is that I've seen in
8 the oppositions that were filed to our motion nonobjection to
9 reviewing that. But then my understanding is the only way to
10 review that is to actually look at the native images. So I
11 don't -- I don't -- it seems like we need access to the native
12 images just to do that.

13 **MR. EHRLICH:** Sure. We don't have an objection to
14 that. I think here we're talking about a very small number of
15 devices, and there's -- we know what we're looking for, source
16 code and video files. There is possible sensitivity to video
17 files, of course, but that I could be there and sit next to
18 you.

19 **MR. PATCHEN:** I think, Your Honor, just the concern we
20 had is just we have no problem with the native devices being
21 made available, that there's a look for the source code, look
22 for video files, inspect those; right? They have the right to
23 do so.

24 But the order limited to that because there's this whole
25 second, "Well, we need to verify it is complete," which to us

1 sounded like a backdoor to look at the things that have been
2 screened out. How else do they verify it's complete?

3 **THE COURT:** Well, I don't know. How are you going to
4 verify it's complete?

5 **MR. JUDAH:** That's a good question, and we'll have a
6 better answer to that once we actually look at the native
7 device.

8 **THE COURT:** Okay.

9 **MR. JUDAH:** I mean, I can tell you it might be as
10 simple as compare the number of files that are nonsource -- you
11 know, nonsource code viewable to what's on Relativity and
12 literally, hopefully, that's all we have to do, but it's
13 difficult to say without that.

14 **THE COURT:** Okay. All right. They need to get the
15 access to the native files.

16 **MR. PATCHEN:** And that's what we said, Your Honor. If
17 there's some mechanistic, you know, metadata way just to verify
18 that, no problem. It's just we just want to make sure that
19 there's that protection.

20 **THE COURT:** But if there isn't --

21 **MR. PATCHEN:** We'll deal with that.

22 **THE COURT:** Well, then I think you deal with it the
23 same way as you do the other devices.

24 **MR. PATCHEN:** I understand.

25 **THE COURT:** You'll get your clawback, but I guess we

1 don't have time just as Mr. Levandowski did not have time to
2 extract it before he handed it over to Stroz. We don't have
3 time. We're doing the same thing now.

4 **MR. PATCHEN:** I appreciate that.

5 **MR. PERLSON:** Yeah. Your Honor, I think with these
6 really we should follow the same procedure as we are with the
7 unreviewed devices.

8 **THE COURT:** That's what I said. To the extent you
9 need to. You have a lot to do, and I assume that you're not
10 going to be rifling through information which is on Relativity
11 just for the purpose of doing that because they don't have
12 time.

13 **MR. PERLSON:** Well, right, but we need to look at the
14 devices because we don't even know what's on the devices. We
15 can't look at the source code on the devices. We need to see
16 the images to actually see the source code. That's the only
17 way.

18 **THE COURT:** I think that's what we're talking about.

19 **MR. EHRLICH:** We agree you can do that. I just am
20 asking for these few devices that have been harvested and have
21 been screened, that you give an opportunity for
22 Mr. Levandowski's counsel to be there to monitor, and we're
23 talking about just a couple. That's not going to slow you
24 down.

25 **MR. PERLSON:** Well, I don't know which ones you're

1 talking about.

2 **MR. EHRLICH:** The ones that Stroz actually reviewed
3 and harvested and put into the Relativity database.

4 **MR. PERLSON:** I thought there was about 50 of them.

5 **MR. EHRLICH:** No.

6 **MR. JUDAH:** Well, I don't know how many actually are
7 Mr. Levandowski's but there's over 30 total for the diligence
8 employees.

9 **THE COURT:** First you're going to be looking at the --
10 well, you're going to hopefully just be able to compare the
11 metadata and figure out if it's the same as what you already
12 had in Relativity; right?

13 **MR. JUDAH:** Sure. I think first we'll be looking at
14 the source code.

15 **THE COURT:** Okay. They're going to be looking at the
16 source code. You don't want to be standing there when they're
17 looking at the source code. No.

18 **MR. EHRLICH:** No need.

19 **THE COURT:** Or I don't know about the videos.

20 **MR. EHRLICH:** That might be necessary, but --

21 **MR. JUDAH:** Well, the --

22 **MR. EHRLICH:** -- this is --

23 **THE COURT:** I don't know why the same thing can't
24 apply to the videos as to the other thing if there's something
25 that they think is relevant. It's not going to be his family

1 because it's not relevant. So --

2 **MR. EHRLICH:** But, Your Honor, there was a lot of
3 tagging of family photos on day one in this Relativity process.
4 It was, we're told, in error but it was quite inconsistent with
5 this idea that they're not interested in looking at that.
6 Somebody was interested who was an attorney employed by Waymo.

7 **MR. PERLSON:** If you want to hear the explanation of
8 what happened --

9 **THE COURT:** I don't. I'm sure it was an accident
10 because nobody has time. It doesn't make any sense.

11 **MR. EHRLICH:** Right. But, again, we're retreating a
12 little bit from a protocol they proposed just a few days ago.
13 So it's not like we suddenly don't have time.

14 **MR. JUDAH:** Right. Well, I mean --

15 **MR. PERLSON:** Suddenly don't have time.

16 **MR. JUDAH:** The difference is that we suddenly don't
17 have time because we still don't have access.

18 **THE COURT:** Well, I think if you -- do you object --
19 you can do it at whatever time you want -- sorry,
20 Mr. Ehrlich -- to telling Mr. Ehrlich so if he wants to be
21 there in realtime with the videos. He doesn't care about the
22 source code.

23 **MR. JUDAH:** It depends, I guess, how many videos there
24 are, and I don't know the answer to that. I mean, if we're
25 talking about -- if there's 100 videos on Mr. Levandowski's

1 devices, and I don't know how many there are, then that
2 probably wouldn't be a problem; but I don't -- I just don't
3 know -- I don't know -- we don't have any information, so it's
4 difficult to say.

5 **MR. PERLSON:** How about I suggest this? So, first of
6 all, I don't know about the videos, but the devices -- I mean,
7 the photographs we've seen so far have been, like, literally
8 screen shots of Waymo confidential information. So I don't
9 know if there's a corollary to that of a video. It could be
10 that, you know, he's going around taking images of a car.

11 **THE COURT:** Okay. Nobody is saying you can't look at
12 the videos.

13 **MR. PERLSON:** Okay. So I guess what we should -- I
14 mean, we could say is once we get the images and if there's,
15 like, a time in which we're saying, "Okay, we're going to start
16 looking at the videos," you know, we can let Mr. Ehrlich know
17 and we'll try to work it out.

18 **MR. EHRLICH:** We'll work it out.

19 **THE COURT:** Please.

20 **MR. PERLSON:** How's that?

21 **MR. EHRLICH:** We'll work it out.

22 **THE COURT:** Please, yes. And I'm not saying you have
23 to do it at his convenience.

24 **MR. PERLSON:** I wasn't offering to.

25 **THE COURT:** I'm saying but he has the opportunity at

1 whatever time it may be, he or his colleagues or the new
2 colleagues he may need to acquire to do that.

3 Okay.

4 **MR. EHRLICH:** Understood. We'll try to work it out.

5 **THE COURT:** So have we taken care of that, then, and
6 the Relativity review is going forward?

7 **MR. JUDAH:** Yes.

8 **THE COURT:** Now, have all the depositions been
9 scheduled?

10 **MR. JUDAH:** No.

11 **THE COURT:** Well, other than the additional ones that
12 you've asked for.

13 **MR. JUDAH:** No, because -- I mean -- you mean that
14 we've asked for in motion practice?

15 **THE COURT:** Yes.

16 **MR. PERLSON:** Other than the ones that were -- I think
17 everything other than the ones that we have disputes over and
18 the couple additional Stroz depositions that we've asked for
19 that we still need to go through the meet-and-confer process,
20 we do have dates for and they're scheduled presently.

21 **MR. GONZALEZ:** The answer to your question is yes.

22 **THE COURT:** Oh, I didn't even see you, Mr. Gonzalez.
23 Were you here?

24 **MR. GONZALEZ:** I've just been hiding the whole time.
25 Yeah, Your Honor, I was waiting for that one question, and then

1 I'll leave. No.

2 The answer is yes. There are 23 depositions scheduled
3 beginning today.

4 **THE COURT:** Okay. All right. Good.

5 Oh, the last thing was -- we didn't figure out is when
6 they ran your search terms in the Relativity database and at
7 least from Mr. Ron there were 84 hits, or something like that.
8 Did I see something like that? Right?

9 **MR. JUDAH:** There were -- there were --

10 **THE COURT:** No. A thousand hits.

11 **MR. JUDAH:** There was over a thousand total. Not just
12 for Mr. Ron, but for all the --

13 **THE COURT:** Right. This is what I think you should
14 do.

15 **MR. PATCHEN:** Your Honor --

16 **THE COURT:** You've worked it out?

17 **MR. PATCHEN:** There's already a protocol that's worked
18 out, I believe, with respect to that. Those have been -- those
19 hits have been reviewed. Those that there's no objection to
20 rolls right through to production. If there is an objection to
21 it, it's promoted to Mr. Cooper. Mr. Cooper has looked at them
22 or is in the process of looking at them for that. So there is
23 a protocol that's going forward. I don't think there's any
24 disputes over that.

25 **THE COURT:** Great.

1 **MR. JUDAH:** I mean, I guess based on what we're seeing
2 with respect to the ones that were withheld on the report of
3 privacy grounds, we do object to this slowing us down because
4 we have to wait -- I think there's still disputed ones that
5 have not been reviewed -- days, and this is only ones that are
6 actually hitting on the search terms.

7 If it's a picture or something that isn't -- or if it
8 doesn't hit on a search term, it happens to use a codeword but
9 it still happens to have the information, we have absolutely no
10 way to see what it is.

11 **THE COURT:** Well, how much -- I mean, how much privacy
12 stuff has been withheld, for example, from Mr. Ron?

13 **MR. PATCHEN:** I believe there was 17,000 that was all
14 done by search terms. So it wouldn't have even caught any
15 photos. The photos are not part of what was excluded on those
16 grounds --

17 **THE COURT:** Okay.

18 **MR. PATCHEN:** -- given the speed with which we were
19 working.

20 **THE COURT:** Yes, Mr. Cooper?

21 **MR. COOPER:** I have to say there were some items
22 elevated to me and I have looked at them, and I entered some
23 rulings last night; but then in light of what was said in court
24 this morning before Judge Alsup and what I'm hearing you say, I
25 have redesignated those to discussion among the counsel, and

1 there are about, I think, eight or ten of them is all.

2 **THE COURT:** Okay.

3 **MR. COOPER:** And I'm happy to talk about that in a
4 meet-and-confer.

5 **THE COURT:** Okay.

6 All right. So your photo problem, not a problem.

7 **MR. JUDAH:** Well, that's for Mr. Ron. I don't --
8 standing here right now, I don't know that the search terms
9 were used by every diligence employee for Stroz.

10 **THE COURT:** Well, we have Mr. Ehrlich here.

11 **MR. EHRLICH:** I want to -- I'm not absolutely certain
12 and I'm happy to follow-up; but we -- on a privacy screen we
13 disclosed to you the search terms we used -- it was
14 girlfriends, family -- and I don't believe that any photos were
15 captured using those search terms. They are still -- they're
16 in the Relativity database unscreened is my understanding, but
17 I can confirm that.

18 **MR. JUDAH:** So with respect to Mr. Levandowski, there
19 is an issue with respect to Max Levandowski is identified as a
20 privacy screen even though he --

21 **THE COURT:** I was wondering. Related?

22 **MR. JUDAH:** Right. They're brothers.

23 **THE COURT:** Brothers? Oh.

24 **MR. JUDAH:** And I don't know what I'm allowed to say
25 in open --

1 **THE COURT:** He worked -- where did he work?

2 **MR. JUDAH:** He worked at Ottomotto.

3 **THE COURT:** Yeah. All right.

4 **MR. JUDAH:** And so he worked -- he works at Uber.

5 **THE COURT:** He can't use that as a privacy screen --
6 sorry -- when you work with your brother and then you get
7 involved with this.

8 **MR. JUDAH:** There's other relevance too that I don't
9 think I'm allowed to go into.

10 **THE COURT:** Sorry. Unscreen it.

11 **MR. EHRLICH:** Unscreen all communications with
12 Mr. Levandowski between the brothers?

13 **THE COURT:** With Max. Look --

14 **MR. EHRLICH:** We've run all the search terms and we've
15 produced immediately --

16 **THE COURT:** But he was a name that you ran?

17 **MR. EHRLICH:** There were family members that were
18 screened for the privacy screen; and then like normal, they
19 produced a long list of search terms, they were immediately
20 run, and we turned around those in a couple of hours.

21 **THE COURT:** So you produced everything that hit? No
22 hit involving Max Levandowski has been withheld?

23 **MR. EHRLICH:** I can't represent to the Court on that
24 point.

25 **THE COURT:** Any hit, any hit involving Max Levandowski

1 should be produced.

2 **MR. EHRLICH:** Gets immediately produced.

3 **MR. JUDAH:** Well, Your Honor, we did some basic search
4 terms. We could do another, you know, 100 easily. We only
5 submitted about 20.

6 What I would suggest --

7 **THE COURT:** That was your choice.

8 **MR. EHRLICH:** I welcome that.

9 **MR. JUDAH:** Well, just to see what was going on.

10 But, look, what I would suggest with Max Levandowski, who
11 is an Ottomotto employee -- he joined, I think, in February.
12 He was one of the early employees. He has other relevance to
13 the case. He's an Uber employee now. The other privacy
14 screens they ran, if there's other family members on those
15 e-mails, that's fine.

16 They can just do what we had initially talked about for
17 privacy, which is they can look and if they are specific ones
18 that they think should be screened, they can elevate those to
19 Mr. Cooper and then they can be pulled.

20 **MR. EHRLICH:** That's an enormous -- because we're
21 starting with the premise that we didn't get -- I asked for
22 weeks for search terms so we could be doing this while we were
23 waiting for the Fed. Circuit. Instead, we had to go through
24 this screening process.

25 So I'm happy to focus on Mr. -- on Max Levandowski if this

1 is a concern. I don't know the volume, but -- and I think any
2 additional search terms you want to provide would be helpful,
3 and we'll get right on it and turn it around and elevate it to
4 Mr. Cooper to the extent there's any issues.

5 **THE COURT:** Okay. I understand why he would be a
6 special case, so give them more terms.

7 **MR. JUDAH:** The issue is, I mean, we didn't include,
8 for example, because we were just trying to see what was going
9 on the privacy screens, you know, Google. Google can hit on a
10 lot of things like gmail and whatnot. We were trying to kind
11 of keep it pretty narrow; but if we have to go and just try to
12 see anything that might hit on something, I mean, it's just --
13 then we're going to get a lot of false hits from everybody, and
14 I just don't think that's the most efficient way.

15 Because, basically, if we throw in a term like "lens" and
16 just start going down into very specific components of the cars
17 or the devices, you're going to increase the number of false
18 hits that aren't relevant.

19 **THE COURT:** So what's your proposal?

20 **MR. EHRLICH:** You get false hits. As long as they
21 don't raise privacy concerns, that's my point.

22 **MR. JUDAH:** Okay. But I -- I mean, my proposal is
23 Max Levandowski is not a privacy screen. That's my proposal.

24 **THE COURT:** So that you get all his documents, which
25 are then false hits.

1 **MR. JUDAH:** No, no. Just that they're made available
2 on the Relativity database and our people can do our normal
3 searches to see what we want to find.

4 **THE COURT:** I see. I see what you're saying.

5 **MR. JUDAH:** Because they're invisible to us now, the
6 Max Levandowski documents. We can't see them on Relativity.
7 It's the same protocol that happens with everything else.

8 **THE COURT:** I mean, it seems to me -- I don't know. I
9 don't know Mr. Max, but it seems to me there are only going to
10 be a few things that are truly private. For example, one
11 example in the papers was escrow documents. Those aren't truly
12 private; right? That's not -- what did you talk about? --
13 extreme privacy. That is not extreme privacy. There is no
14 harm in them reviewing. It's a false hit. It's irrelevant but
15 it's not extreme privacy.

16 **MR. EHRLICH:** Right.

17 **MR. PATCHEN:** What it was was an escrow document that
18 was exchanged with his wife. So it was an attachment on a
19 spousal privilege that had the name as the counterparty on the
20 escrow as a Mr. Otto hit on the search term "Otto." We
21 promoted the attachment. We didn't say we objected to the
22 attachment. It was promoted, but there's a reason why it was
23 in the screen and it wasn't because of an "Otto" search.

24 **MR. EHRLICH:** And the system is really working. The
25 diligence counsel, we're turning it around immediately and then

1 if there are any issues, Special Master Cooper rules.

2 **THE COURT:** Okay. What I want you to do is for Max
3 provide all the terms you want. Essentially do the same search
4 you would do in Relativity.

5 **MR. JUDAH:** Well, we are doing a linear review in
6 Relativity; but if that's what you want us to do, we can do
7 that.

8 **THE COURT:** Just do that. You know what? Discovery
9 is not perfect; right? It's not perfect.

10 **MR. JUDAH:** We hired over 85 conduct attorneys to do
11 it.

12 **THE COURT:** It's still not going to be perfect. It's
13 just not perfect. In any case when you have three years, five
14 years, it's not perfect. And, in fact, when you get to trial,
15 as you know, the amount of documents that will actually be used
16 compared to what's produced in this case will be infinitesimal;
17 right? Infinitesimal.

18 So -- but go ahead. Provide them all the terms you want,
19 all the terms you want.

20 **MR. JUDAH:** Okay. But we --

21 **THE COURT:** If you get hits, unless it's truly
22 private, just give it to them.

23 **MR. EHRLICH:** Absolutely.

24 **THE COURT:** Yeah.

25 **MR. PATCHEN:** That's what we've been doing,

1 Your Honor.

2 **THE COURT:** Unless it's extremely private.

3 **MR. EHRLICH:** Yes.

4 **MR. JUDAH:** And also you're saying we should provide
5 more search terms for all the privacy screens?

6 **THE COURT:** Well, Max was the one that you brought up.

7 **MR. JUDAH:** Well, that's why I think he shouldn't
8 apply at all but, okay. Well, I understand.

9 **THE COURT:** Work something out. They're willing to
10 work with you on that.

11 **MR. EHRLICH:** When I'm not sitting next to you at
12 3:00 a.m.

13 **THE COURT:** Okay. So is there anything else that we
14 should discuss?

15 **MR. JUDAH:** I would love to discuss the motion to
16 compel the depositions.

17 **THE COURT:** You know, I just -- I haven't read it, so
18 not helpful.

19 What I will do is I'm going to go through and read through
20 it and I'm going to figure out if you've shown good cause;
21 right? Discovery is closed. You have to show that what was
22 produced after is good cause to take those depositions.

23 **MR. JUDAH:** One -- and I think we've made that
24 showing, but I will note that even the hearing this morning has
25 shown additional relevance. Apparently there's going to be a

1 dispute about whether -- what exactly was said at that board
2 meeting. It sounds like Mr. Kalanick, who wasn't allowed to
3 testify in his first deposition --

4 **THE COURT:** But he is being deposed again.

5 **MR. JUDAH:** He is being deposed again, but he's
6 apparently going to say, "No, I didn't say that the diligence
7 came back clean." But then Mr. Gurley, who will also be
8 deposed again, said the opposite thing at his deposition.
9 Ms. Yu attended that board meeting.

10 And I'll note Mr. Kalanick didn't even remember making
11 that presentation in the first place, so I'm going to be very
12 surprised to see what he suddenly remembers about it now.

13 But I think the fact that she was a witness who attended
14 that board meeting is just something that we didn't have -- I
15 didn't realize it was going to be a disputed issue until this
16 morning, so that was not in our papers, but we think you should
17 be aware.

18 **THE COURT:** Okay. That's fair enough. Would anyone
19 like to respond to that?

20 **MR. GONZALEZ:** Just briefly, Your Honor.

21 There are 15 depositions that they're going to take on
22 Stroz. 15.

23 **THE COURT:** Right. Right. But, no, he's talking very
24 particularly about -- all I want to hear about is the board
25 meeting.

1 **MR. GONZALEZ:** So I didn't hear anything about that
2 till just now, Your Honor, so I'm not in a position to tell
3 you. I don't want to represent to you because I don't even
4 know standing here right now who was at the board hearing in
5 order to testify.

6 **THE COURT:** So if you could just by the end of the
7 day -- that meaning midnight -- just respond to that; right?

8 So my understanding is one reason you want Ms. Yu -- I
9 will note that you did take Mr. Drummond; right?

10 **MR. GONZALEZ:** We did.

11 **THE COURT:** Yeah. But one reason you want Ms. Yu is
12 because you want to find out at this board meeting what was
13 said about the results of the due diligence report?

14 **MR. JUDAH:** Right.

15 **THE COURT:** Okay. All right. So you can respond to
16 that.

17 **MR. GONZALEZ:** We'll address that, Your Honor.

18 **THE COURT:** Okay.

19 **MR. GONZALEZ:** Thank you.

20 **THE COURT:** Okay.

21 (Counsel conferring.)

22 **THE COURT:** Okay? Okay. Thank you very much. Thank
23 you, Mr. Cooper.

24 (Proceedings adjourned at 3:38 p.m.)

25 ---oOo---

CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

DATE: Thursday, September 28, 2017

A handwritten signature in black ink, appearing to read "Jo Ann Bryce", is written over a horizontal line.

Jo Ann Bryce, CSR No. 3321, RMR, CRR, FCRR
U.S. Court Reporter